

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Civil

Royal Credit Union, Minnesota Credit
Union Network, Magnifi Financial
Credit Union, Wings Financial
Credit Union,

Plaintiff,

vs.

Minnesota Department of Commerce and
Grace Arnold, in her official capacity as
Commissioner of the Minnesota Department
of Commerce,

Defendant.

Court File No. 62-CV-22-5162

**ORDER GRANTING MOTION
TO DISMISS**

Defendants Minnesota Department of Commerce and Grace Arnold, in her official capacity as Commissioner of the Minnesota Department of Commerce, (the Department) move to dismiss. Plaintiffs Royal Credit Union, Minnesota Credit Union Network, Magnifi Financial Credit Union, and Wings Financial Credit Union (Credit Unions) were represented by Lori Swanson of the law firm Swanson Hatch, P.A. and by Gabriel Bedoya and Laura Biery of the law firm Honigman LLP. The Department was represented by Assistant Minnesota Attorneys General Christopher Kaisershot and Stephen Melchionne.

BACKGROUND

The Department moves to dismiss pursuant to Minnesota Rules of Civil Procedure 12.02 (a) and (e) for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. Minnesota Rule of Civil Procedure 8.01 requires “[a] pleading which sets forth a claim for relief ... [that] shall contain a short and plain statement of the claim showing that the pleader is entitled to relief.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601

(Minn. 2014)(quoting Rule 8.01). Minnesota Rule of Civil Procedure 12.02(a) authorizes a party to bring a motion to dismiss asserting a lack of jurisdiction and, Minnesota Rule of Civil Procedure 12.02(e) authorizes a party to bring a motion to dismiss, asserting the complaint does not state a claim upon which relief may be granted. A motion to dismiss should be granted only if “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (1963). “But a legal conclusion in the complaint is not binding on the Court” and “a plaintiff must provide more than labels and conclusions.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

On September 20, 2022, the Credit Unions filed a complaint alleging Royal Credit Union is a National Credit Union Association insured and Wisconsin state-chartered credit union having its principal place of business in Eau Claire, with branches in small northern Wisconsin communities and in Minnesota with several branches in the Twin Cities area. Complaint ¶5. Minnesota Credit Union Network is a statewide trade association for credit unions operating in Minnesota. Complaint ¶6. Magnifi Financial Credit Union is a NCUA insured and Minnesota state-chartered credit union having its principal place of business in Melrose, Minnesota, with branches in small central and northern Minnesota communities. Complaint ¶7. Wings Financial Credit Union is a NCUA insured and Minnesota state-chartered credit union having its principal place of business in Apple Valley, Minnesota, with branches in the Twin Cities and in greater Minnesota. Complaint ¶8.

In 2016, Royal Credit Union acquired substantially all of the assets and assumed substantially all of the liabilities of Capital Bank, a Minnesota state-chartered bank. Complaint

¶74. On August 18, 2016, the Department confirmed by letter that the transaction could be completed. Complaint ¶78.

In March of 2021, the Department circulated draft guidance concerning merger, consolidation, acquisition, and purchase transactions between credit unions and banks. Complaint ¶20. The draft guidance said state-chartered banks would not be able to sell to or merge with a credit union because Minnesota Statutes sections 49.33 to 49.41 do not permit banks to engage in purchase, merger, consolidation, or other acquisition transactions with credit unions. Complaint ¶23. The complaint alleges the draft guidance is inconsistent with the prior position of the Department and with Minnesota law because it did not distinguish consolidations and mergers from transfers of assets and liabilities. Complaint ¶24.

In 2021, an investment banker representing Lake Area Bank, contacted Royal Credit Union about a possible acquisition of Lake Area Bank. Complaint ¶31. At the time, Lake Area Bank had branches in Lindstrom, Forest Lake, Hugo, White Bear Lake, and Stillwater, Minnesota. Complaint ¶33. Royal Credit Union entered into a Purchase and Assumption Agreement through which Lake Area Bank would sell substantially all of its assets and transfer all of its liabilities to Royal Credit Union. Complaint ¶43.

Under the Federal Deposit Insurance Act, an insured depository institution must obtain prior written approval of the Federal Deposit Insurance Corporation to “transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured depository institution.” 18 U.S.C. §1828(c)(1)(C). Since Lake Area Bank was insured by the FDIC and Royal Credit Union was insured by the NCUA, Lake Area Bank sought the FDIC’s approval for the transaction. Complaint ¶47-49.

On September 17, 2021, the FDIC Assistant Regional Director sent a letter to Maxwell Zappia, the Deputy Commissioner for Financial Institutions at the Minnesota Department of Commerce, seeking the Department's written views regarding the application. Zappia Affidavit Exhibit A. On November 1, 2021, Zappia, responded that the Department understood the proposed transaction involved purchase of "substantially all of the assets" and assumption of "substantially all liabilities" of Lake Area Bank. Complaint Exhibit A. The letter continues that the Department understood Lake Area Bank would make a final liquidating distribution of any remaining assets and liabilities following the acquisition and would file notice with the Department to officially "dissolve, liquidate and return the bank charter to the state." Complaint Exhibit A. With those understandings, the Department wrote that "Minnesota Statutes § 49.06 only allows such liquidations between like financial institutions" and that Minnesota law required Lake Area Bank to obtain the consent of the Commissioner of Commerce to voluntarily liquidate," something Lake Area Bank had not done. Complaint Exhibit A.

The letter further noted that a transfer of all or substantially all of the assets and liabilities to "another bank, savings bank, or trust company for the purpose of consolidating or merging" may occur with the consent of commissioner of commerce, citing Minn. Stat. §49.33, 49.36, but that "Under Minnesota law, Lake Area Bank may only transfer substantially all of its assets and liabilities to another bank, not to a credit union." Complaint Exhibit A. The letter concluded "the Minnesota Department of Commerce believes that the FDIC should disapprove the Merger Act Application as incompatible with Minnesota law." Complaint Exhibit A.

The Complaint alleges that on December 10, 2021, Lake Area Bank sent a letter to the Deputy Commissioner asking the Department to withdraw the objection letter to the FDIC, arguing the objection was contrary to Minnesota law and to prior positions the Department had

taken relating to other similar transactions. Complaint ¶60-61. The letter also inquired whether an administrative appeal of the Department's position was available. Complaint ¶62. The complaint alleges that on December 14, 2021, the FDIC notified Lake Area Bank that it would not approve the proposed transaction so long as the Department objected. Complaint ¶63. On January 14, 2022, the Department responded that it would not withdraw the objection letter and that since Lake Area Bank had no pending application before the Department, administrative appeal was not available. Complaint ¶64-65.

On March 11, 2022, Royal Credit Union and Lake Area Bank restructured and pared down the proposed transaction, with Royal Credit Union acquiring the Hugo, Stillwater, and White Bear Lake branches as well as Lake Area's mortgage division. Complaint ¶67. Lake Area Bank sought FDIC approval of the transaction. Complaint ¶68. The Minnesota Department of Commerce indicated it would not comment on the proposed transaction. Complaint ¶69. The complaint does not indicate whether the FDIC ultimately approved the transaction.

The complaint alleges the Department's actions have "created an environment of regulatory upheaval, confusion, and uncertainty." Complaint ¶138. Royal Credit Union, MCUN, Magnifi, and Wings Credit Union would like to engage in future transactions to acquire the assets and liabilities of other Minnesota state-chartered banks, but may not do so if the Department will block such transactions. Complaint ¶141-43. Magnifi was negotiating an asset purchase and assumption agreement with a state-chartered bank but withdrew from the transaction out of concern the Department would block the transaction. Complaint ¶144. Wings Credit Union has sought to acquire the assets of state-chartered banks and, in discussions with those banks, the uncertainty as to the Department's position has been raised and, in one instance, has been cited as a reason for ceasing discussions. Complaint ¶146.

Count one of the complaint seeks a declaration that Minnesota Statutes sections 49.06 and 49.33 do not prohibit a credit union from acquiring the assets and liabilities of a Minnesota state-chartered bank through an asset purchase and assumption agreement. Complaint ¶156. Count two, asserts Minnesota Statutes sections 49.06 and 49.33 violate the due process protections of the Fourteenth Amendment to the United States Constitution and Article I section 7 of the Minnesota Constitution because they are too vague, do not give fair notice of the conduct they prohibit, and invite arbitrary enforcement. Complaint ¶159-166.

On January 30, 2023, the Department filed motions to dismiss under Minnesota Rules of Civil Procedure 12.02(a) and (e) along with a supporting memorandum and materials. On February 13, Plaintiffs filed a memorandum opposing dismissal with supporting materials. On February 17, 2023, the Department filed a reply memorandum. On February 27, 2023, the Court held a hearing, received argument, and took the matter under advisement.

I

This Court lacks jurisdiction. As to the abandoned transaction, the matter is moot. A claim is moot if a decision on the merits is unnecessary or an award of effective relief is no longer possible. *See, e.g., Snell v. Walz*, 985 N.W.2d 277, 283-84 (Minn. 2023) *citing Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). Mootness is a “flexible discretionary doctrine” applicable when “a decision on the merits is no longer necessary or an award of effective relief is no longer possible.” *Dean*, 868 N.W.2d at 4 *citing In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). Even assuming the Department’s objection effectively determined the FDIC’s decision (something the allegations in the complaint do not support)¹, Royal Credit Union abandoned the transaction in favor of a different transaction on which the complaint alleges the

¹ 18 U.S.C. §1828(c) requires the FDIC to approve mergers or consolidations.

Department took no position. If an award of relief would ever have been effective, it would no longer be effective now or in the future. The matter is moot.

Plaintiffs' claims arising out of their desire to engage in future transactions that are effectively prohibited by the Department's de facto or draft policy guidance are not ripe. Plaintiffs have not submitted an actual application proposing an actual transaction. Plaintiffs seek a declaration from this Court as to what Minnesota Statutes sections 49.06 and 49.33 allow or disallow. Section 49.06 provides that a "financial institution in the course of liquidation may, with the consent of the commissioner, consolidate with any other like financial institution, upon such terms as may be authorized by their respective boards of directors..." Section 49.33 provides that "with the written consent of the commissioner of commerce, any bank, savings bank, or trust company may effect a transfer of its assets and liabilities to another bank, savings bank, or trust company for the purpose of consolidating or merging..." The Court lacks an actual proposed transaction to review and the Department has not indicated an objection to any proposed transaction other than the one Lake Area Bank withdrew from the FDIC's consideration. There is no present actual adversity or controversy. The matter is speculative and not ripe for decision.

Moreover, section 49.06 and 49.33 both assign the decision to consent to a proposed transaction to the Commissioner, not to the Courts. Appeal of a decision of the Commissioner of Commerce may be for any number of reasons. Appeal may be taken because the Department has de facto established rules governing its decision but has not followed the requisite statutory process for adopting rules. Appeal may be taken because the Department has adopted rules and did not follow them. Appeal may be taken because the rules the Department adopted do not fall within the statutory authority or limitations the statutes set forth. In each instance, however, the

appellate path begins with an administrative appeal to the Department of a decision of the Department, followed by appeal to the Court of Appeals. That path exists to afford the executive branch proper deference and also to recognize and take advantage of the presumed expertise of a state executive branch agency. The district court plays no role.

This case provides a textbook example of the identified considerations. Questions of what constitutes a liquidation, what qualifies as a “like financial institution,” what qualifies as a “consolidation,” “a transfer of assets,” and a “transfer of liabilities” are for the Department to outline and answer in the first instance. The questions should not be answered by this Court and particularly not by the Courts (whether this Court or the Court of Appeals) in the abstract without the benefit of an actual transaction which has been subject to administrative ruling and challenge to that ruling.

To state the concept in different legal terms, the Court also lacks jurisdiction because Plaintiffs have failed to seek and exhaust their administrative remedies. Such remedies might include, for example, appeal to the FDIC for a transaction requiring that agency’s approval. *See* 12 C.F.R. §303.11 subpart F (appeal of FDIC disapproval to an agency supervisory review committee). The remedies might also include appeal within the Department of Commerce, and, if necessary, to the Court of Appeals. *See, e.g., Stephens v. Board of Regents of the Univ. of Minn.*, 614 N.W.2d 764, 773 (Minn. App. 2000). The point is, administrative review would be available and is required if a future actual transaction were to be submitted.

In short, the claims Plaintiffs seek to raise in their complaint are not justiciable. This Court lacks the subject matter jurisdiction to address the claims and they must be dismissed.

II.

Count 2 of the complaint challenges Minnesota Statutes sections 49.06 and 49.33 as violating the due process clauses of the United States and Minnesota Constitutions as impermissibly vague. Technically speaking, the Court may not reach the vagueness count because, similar to count 1, it is not justiciable. Yet, even if that were not the case, count 2 must be dismissed.

A statute that defines an act in a manner that encourages arbitrary and discriminatory enforcement or is so indefinite that people must guess at its meaning is void for vagueness. *See, e.g., In re Civil Commitment of Ramey*, 648 N.W.2d 260, 267 (Minn. App. 2002) *citing Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001). The burden is on the party challenging a statute and courts “should exercise extreme caution before declaring a statute void for vagueness.” *Hard Times Café, Inc.*, 625 N.W.2d 171. In addition, a phrase in a statute is not impermissibly vague because it is possible to imagine some difficulty in determining whether certain marginal fact situations fall within its language. *See Ramey*, 648 N.W.2d at 267. Caselaw construction or agency ruling may provide sufficient definitive interpretation of an otherwise undefined or ambiguous term and a statute is void only if it is “impermissibly vague in all of its applications.” *See Ramey*, 648 N.W.2d at 267 *citing Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). Finally, “in challenging a statute as void for vagueness, the challenging party must show that the statute lacks specificity as to his own behavior” and an “offender whose behavior is clearly proscribed by law may not challenge an enactment because of vagueness as applied to the conduct of others.” *Id.*

In their complaint, Plaintiff’s find sufficient clarity in sections 49.06 and 49.33 to argue the Department misapplied them to the proposed Lake Area Bank transaction and that the

statutes are inapplicable to future transactions that are not consolidations or mergers. *See* Complaint at ¶101-135. In any event, without an actual transaction to consider, Plaintiffs cannot meet their burden on showing the statute lacks the requisite specificity as applied to Plaintiffs' own behavior. Without an administrative challenge to a specific transaction affording the Department an opportunity to adopt a definitive interpretation or a narrowing construction, the Plaintiffs cannot show the statutes are impermissibly vague in all of their applications.

For these reasons, count 2 of the complaint must be dismissed.

ORDER

The motion of Defendants the Minnesota Department of Commerce and Grace Arnold, in her official capacity as Commissioner of the Minnesota Department of Commerce to dismiss is GRANTED.

The complaint of Plaintiffs Royal Credit Union, Minnesota Credit Union Network, Magnifi Financial Credit Union, and Wings Financial Credit Union is DISMISSED in its entirety.

There being no reason for delay, judgment shall be entered.

Patrick C. Diamond
Judge of District Court